

## ORDER

the District Court in the Eighteenth Judicial District of Kansas, along with the envelope used to deliver the appointment letter to claimant's attorney. The Board heard oral argument on February 15, 2008.

### **ISSUES**

1. Was claimant's appeal of the ALJ's Award timely?
2. What is claimant's average weekly wage?
3. Is claimant entitled to benefits for an underpayment of temporary total disability (TTD) compensation?
4. What is the nature and extent of claimant's injuries? Claimant alleges he injured both his neck and left shoulder on August 3, 2005, when he was struck on the head by an overhead garage door which had come off its track. Respondent argues that claimant failed to report left shoulder problems for over two months after the accident and has failed to carry his burden of proof that he suffered any left shoulder injury from this accident.
5. Is claimant entitled to additional medical treatment expenses for the left shoulder?
6. Is claimant entitled to benefits for future medical treatment and unauthorized medical expenses?

### **FINDINGS OF FACT**

Claimant, a delivery driver for respondent, was loading his truck at respondent's facility in Abilene, Kansas, on August 3, 2005, when a garage door came off its track and struck claimant in the head. Claimant thought he was knocked unconscious, but was not sure. An ambulance was called, and claimant was found by the EMTs lying in a fetal position, holding his head. Claimant was conscious when found, but appeared disoriented. Claimant was transferred to Abilene Memorial Hospital where he came under the treatment of board certified family practice specialist James Dennis Biggs, M.D. Dr. Biggs, who was claimant's family physician and just happened to be on duty that night, noted that there was no loss of consciousness, but claimant was confused and disoriented. Claimant was admitted overnight for observation. Claimant was complaining of a headache and a

neck ache, both at the time of admission and the next day. The report of August 4, 2005, indicates Ibuprofen relieved both. A CT scan of claimant's head and regular x-rays of his neck were unremarkable. No other evidence of injury or continued neurological symptoms were noted at the time of claimant's dismissal from the hospital on August 4, 2005. There was no mention of claimant's left shoulder in the emergency room, EMT or dismissal records.

Dr. Biggs examined claimant again on August 8, 15, 18, 22 and 29, and on September 12, 2005. At no time during those examinations did Dr. Biggs record any mention of claimant's shoulder. The first mention in Dr. Biggs' records of left shoulder problems related to this accident was on September 14, 2006, over one year after the September 12, 2005 visit. However, left shoulder complaints are recorded in the physical therapy notes beginning October 7, 2005, two months after the accident.

Claimant was referred by the insurance company to board certified neurological surgeon John Hered, M.D., on September 7, 2005. Claimant complained of neck pain and headaches from the falling door on August 3, 2005. A cervical MRI displayed disc disease at C5-6 on the right side. No surgery was recommended. Dr. Hered found no clinical significance to the disc findings and noted the headaches were more from muscle spasm, and he recommended therapy.

Claimant was then sent for further evaluation by Nancy Richards, the insurance nurse case manager, to board certified physical medicine specialist Sandra Barrett, M.D. Claimant was first examined by Dr. Barrett on September 30, 2005. Dr. Barrett first diagnosed myofascial neck pain. Claimant was started on muscle relaxants and referred for physical therapy. The records also indicate claimant was injected with two trigger point injections in the left trapezius area. Claimant was discharged on December 9, 2005, at maximum medical improvement (MMI) for the neck pain. Claimant was free from headaches and had no numbness or tingling at the time of his release. Dr. Barrett rated claimant at 5 percent to the cervical spine for the neck pain, with the rating being pursuant to the fourth edition of the *AMA Guides*.<sup>1</sup>

Through the time of his discharge, claimant had voiced no complaints to Dr. Barrett regarding the left shoulder. The first mention in Dr. Barrett's records of shoulder complaints did not occur until January 12, 2006. This was after claimant had been returned to work for about three weeks. Dr. Barrett acknowledged that claimant had trigger points in the paraspinals and over the left trapezius, and she administered trigger point injections to the left trapezius. As noted above, claimant also had a physical therapy

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

evaluation on October 7, 2005, which indicated claimant had shoulder symptoms and complained of numbness and tingling down his left arm. Dr. Barrett was asked if these findings were consistent with an injury to claimant's left shoulder, and she said no. She explained that the neck pain would radiate into the shoulder to cause the symptoms. The ongoing physical therapy notes indicated continued treatment of both the neck and the left shoulder. The outpatient physical therapy note from Salina Regional Health Center dated December 6, 2005, indicated a continued deficit in the range of motion and strength in the left upper extremity at the time of claimant's discharge.

On June 20, 2006, Laura Pivonka, the nurse case manager, wrote Dr. Barrett regarding a report submitted by orthopedic surgeon Pat D. Do, M.D., indicating claimant may have a torn rotator cuff in the left shoulder. Dr. Do's report of September 5, 2006, indicated an MRI would be appropriate to determine whether the rotator cuff tear was caused by trauma or bone spurs. In Dr. Do's opinion, if the tear was on the articular surface, then the injury more than likely was the result of trauma. If the tear was a bursal surface tear, then it would be more likely the result of a bone spur digging into the cuff, with the pain incidental to the injury. The MRI results indicated a labral tear, which Dr. Do indicated would most likely come from the garage door hitting the shoulder.<sup>2</sup> The history provided Dr. Barrett indicated claimant was hit in the head by the garage door, but not the shoulder. Dr. Barrett did not believe claimant's shoulder rotator cuff problems were related to the accident with respondent. On January 9, 2006, Dr. Barrett again rated claimant at a 5 percent permanent partial whole body impairment, finding claimant had a DRE cervical thoracic category II impairment pursuant to the fourth edition of the *AMA Guides*.<sup>3</sup>

Claimant returned to Dr. Barrett on January 12, 2006, reporting that after returning to work for three weeks, he started having increased neck pain and aching and numbness in the left upper extremity. Dr. Barrett noted that, according to her office notes, it was after returning to work that claimant began alleging left shoulder pain. However, she also agreed claimant had voiced complaints concerning the shoulder while attending physical therapy after the September 2005 referral. In fact, at the time of the December 6, 2005 discharge from physical therapy at the Salina Regional Health Center, claimant continued to have deficits in range of motion and strength in the left upper extremity. Dr. Barrett did explain that she felt the left shoulder complaints were not related to the accident because her treatment of claimant was always specific to the myofascial neck trigger points and not the actual shoulder itself. It remained her opinion the rotator cuff tear was not related to the August 3, 2005 accident.

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<sup>2</sup> P.H. Trans., Cl. Ex. 1.

<sup>3</sup> *AMA Guides* (4th ed.).

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an evaluation on January 26, 2006. Claimant complained of neck pain with radiating pain into the shoulder and headaches. Claimant also had numbness and tingling of the left upper extremity including the arm and, at times, the left hand.<sup>4</sup> An MRI of the cervical spine indicated a paracentral disc protrusion at C5-6 which, Dr. Murati opined, was probably the cause of the radiculopathy. The examination of the left shoulder revealed a positive rotator cuff examination and a limited range of motion of the shoulder. Claimant also had a positive Hawkins examination, indicating a rotator cuff issue. Dr. Murati determined that claimant had suffered a tear of his left rotator cuff from the accident on August 3, 2005. He testified that any blow to the left side of the neck could affect the shoulder.

Dr. Murati rated claimant pursuant to the fourth edition of the *AMA Guides*<sup>5</sup> at 15 percent to the whole person for the radiculopathy in the neck, placing claimant in the Cervicothoracic DRE Category III. For the myofascial pain syndrome affecting the upper back or thoracic paraspinals, he gave claimant a 5 percent whole person impairment, placing claimant in Thoracolumbar DRE Category II. For loss of range of motion of the left shoulder, he provided claimant a 4 percent left upper extremity impairment which converts to a 2 percent whole person impairment. Using the Combined Values Chart, these combine for a 21 percent whole person impairment.

Claimant was referred by the ALJ to orthopedic and spine surgeon Lee R. Dorey, M.D., for an independent medical examination (IME) on May 8, 2007. Claimant complained of neck pain and left shoulder pain at the time of his examination by Dr. Dorey. Claimant had a limited range of motion of the left shoulder with tenderness. Claimant was diagnosed with cervical disc derangement at C5-6 with a mild herniation and impingement of the left shoulder with acromioclavicular arthritis and a possible labral tear. Dr. Dorey found the cervical injuries to be related to the August 3, 2005 accident. However, the left shoulder problems were not found to be related to the work accident. Instead, Dr. Dorey found them to be the normal wear and tear of the shoulder associated with aging and normal use. Using the fourth edition of the *AMA Guides*,<sup>6</sup> Dr. Dorey found claimant to have a 5 percent permanent partial whole body impairment for the cervical spine.

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<sup>4</sup> Dr. Murati testified “numbness and tingling of the left arm and right hand at times.” (See Murati Depo. at 10-11; see also Murati Depo., Ex. 2 (Dr. Murati’s January 26, 2006 report) at 1.) However, on page 2 of Dr. Murati’s report, it says that claimant stated he had no more episodes of numbness and tingling of the left upper extremity. (Murati Depo., Ex. 2 at 2.)

<sup>5</sup> *AMA Guides* (4th ed.).

<sup>6</sup> *AMA Guides* (4th ed.).

The Award of the ALJ was dated November 5, 2007. Claimant's application for review and Motion For Permission To File And Docket Board Of Appeals Review out of time were filed December 5, 2007, well beyond the 10 days allowed for an appeal pursuant to K.S.A. 2007 Supp. 44-551(i)(1). Claimant argues that the Award was not received in his attorney's office until faxed on November 30, 2007, and received through the U.S. mail on December 4, 2007. Additionally, claimant did not learn of the issuance of the Award until his attorney was contacted by respondent's attorney and was faxed a copy of the Award on November 30, 2007. The Appeal filed by claimant was within 10 days of the receipt of the Award on November 30, 2007. The Affidavit filed by claimant's attorney states he first learned of the Award on November 30, 2007, when he received a faxed copy from respondent's counsel.

### **PRINCIPLES OF LAW AND ANALYSIS**

#### **1. Was claimant's appeal to the Board timely?**

K.S.A. 2007 Supp. 44-551(i)(1) states:

Administrative law judges shall have power to administer oaths, certify official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges. All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation. Review by the board shall be a prerequisite to judicial review as provided for in K.S.A. 44-556 and amendments thereto. On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.<sup>7</sup>

There is no doubt that claimant's appeal from the November 5, 2007 Award was untimely. The application for review with the request to file the appeal late were not filed until December 5, 2007. The Kansas Supreme Court has been asked to consider this

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<sup>7</sup> K.S.A. 44-551(i)(1).

issue in two recent cases. In *Nguyen*,<sup>8</sup> the Court was asked to decide whether an award sent to an incorrect zip code, which caused the award to reach the claimant's counsel well past the 10-day time limit, was a denial of due process. The Court, finding the filing delay by the claimant's counsel was the direct result of an error made in the ALJ's office in addressing the award, determined that the addressing error was a denial of due process. The Court held that while the Workers Compensation Act is complete within itself, "due process is a United States and Kansas constitutional protection, and the procedures of the Workers Compensation Act must include procedures adequate to provide due process."<sup>9</sup> The Court went on to say that while the mere filing of the award by the ALJ is all that is statutorily required, it is the mailing of the award and receipt of the award by the parties that constitutes notice. Where, in *Nguyen*, the award is misaddressed to the extent the claimant failed to receive the award prior to the running of the time limitation, notice sufficient to satisfy due process was not provided.

The Court was also asked to consider this issue in *Johnson*.<sup>10</sup> In *Johnson*, as in *Nguyen* and this case, an award was issued which did not timely reach one of the parties. The claimant's attorney did not learn of the award until the last day of the 10-day time period. This did not allow the attorney sufficient time to contact his client regarding the potential for an appeal. In *Johnson*, as here, there was nothing in the record that showed that the mailing was misaddressed. The Court noted that the right to an appeal is neither constitutional nor a vested right. However, it must provide the minimum essential elements of due process of law. The Court went on to state that in order to "satisfy due process, notice must be reasonably calculated, under all of the circumstances, to apprise the interested parties of the pendency of an action and to afford the parties an opportunity to present any objections."<sup>11</sup> The Court held ". . . that the lack of actual receipt of notice by Johnson's counsel tolled the statutory 10-day limit."<sup>12</sup>

In this instance, claimant's attorney filed an Affidavit attesting to having not learned of the entry of the Award until November 30, 2007. Claimant's attorney also placed into the record, attached to the stipulation of the parties, a copy of the envelope from the ALJ showing a metered date stamp of November 5, 2007, and a copy of the Award showing

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<sup>8</sup> *Nguyen v. IBP, Inc.*, 266 Kan. 580, 972 P.2d 747 (1999).

<sup>9</sup> *Id.* at 588-89.

<sup>10</sup> *Johnson v. Brooks Plumbing*, 281 Kan. 1212, 135 P.3d 1203 (2006).

<sup>11</sup> *Id.* at 1215, citing *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314-15, 94 L. Ed. 865, 70 S. Ct. 652 (1950); *Nguyen*, 266 Kan. at 588.

<sup>12</sup> *Id.* at 1217.

a received stamp of December 4, 2007. In following both *Nguyen* and *Johnson*, the Board grants claimant's request to file the appeal out of time. The first notice to claimant of the issuance of the Award occurred on November 30, 2007, and claimant filed his appeal within 10 days of that receipt date.

## **2. What is claimant's average weekly wage?**

K.S.A. 2005 Supp. 44-511(b)(4) states:

If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided in paragraph (5) of this subsection; (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (i) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation.<sup>13</sup>

Claimant argues that he has proven an average weekly wage of \$1,326.96, just for wages, without adding the value of fringe benefits. Claimant contends that Claimant's Exhibit 1 to the Regular Hearing (an earnings statement) covers a period of 13 weeks, and simple division allows the determination of the above wage. At oral argument to the Board it was pointed out to claimant's counsel that the wage statement appeared to cover 26 weeks, and the payments were every two weeks. Claimant's counsel acknowledged

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<sup>13</sup> K.S.A. 2005 Supp. 44-511(b)(4).



this possibility, but indicated the exhibit was not clear. Therefore, he declined to stipulate to the average weekly wage found by the ALJ in the Award.

In reviewing Claimant's Exhibit 1 from the regular hearing, the Board finds that the wage statement reflects payments of wages every two weeks and covers a period of 26 weeks. Claimant's position with regard to the average weekly wage has no merit. The Board finds the determination by the ALJ that claimant had an average weekly wage of \$663.48, plus fringe benefits of \$60.69, is supported by this record and is affirmed.

### **3. Was there an underpayment of TTD compensation?**

As the TTD and weekly permanent disability rates are determined using the average weekly wage, the weekly payment rate of \$442.34 calculated by the ALJ in the Award, representing the weekly amount of TTD due and owing in this matter, is also found to be correct and is affirmed. As of February 10, 2006, when the fringe benefits were ended, claimant's average weekly wage is modified to add an additional \$60.69 per week, pursuant to the stipulation of the parties, and claimant's weekly wage will be \$724.17. The corresponding weekly benefit rate will increase to the maximum weekly rate of \$467.00 on that date.

### **4. What is the nature and extent of claimant's injuries?**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>14</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>15</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>16</sup>

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<sup>14</sup> K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

<sup>15</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>16</sup> K.S.A. 2005 Supp. 44-501(a).

The two phrases “arising out of” and “in the course of,” as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase “in the course of” employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer’s service. The phrase “out of” the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”<sup>17</sup>

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker’s employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.<sup>18</sup>

The parties agree claimant suffered an accidental injury involving his cervical spine. Both Dr. Dorey and Dr. Barrett found claimant to have suffered a 5 percent permanent partial whole body disability to the cervical spine from the accident. The Board agrees and adopts that rating for the purposes of this award. The dispute arises with the allegation that claimant also injured his left upper extremity, including his shoulder, at the time of the accident. The ALJ determined that the opinions of Dr. Barrett and Dr. Dorey were the more credible and limited claimant to a 5 percent permanent partial whole body disability for injuries to claimant’s cervical spine only. The ALJ specifically found the opinion of Dr. Murati to be unreliable. The Board disagrees with this finding. While Dr. Barrett found claimant’s shoulder complaints did not arise out of the accident, the record shows that Dr. Barrett paid little attention to the physical therapy notes which documented claimant’s shoulder complaints as early as October 7, 2005. This was substantially before Dr. Barrett’s first documented record of left shoulder complaints on January 12, 2006.

Dr. Dorey utilizes, to a significant degree, the medical records of Dr. Barrett to reach his conclusion. This reliance on the medical records of Dr. Barrett also casts a cloud on the opinion of Dr. Dorey. Additionally, Dr. Dorey, even after finding the shoulder to not be related to the accident, went on to provide treatment for claimant’s left shoulder. Dr. Do opined that claimant’s shoulder injury could have occurred when the door hit claimant on the shoulder. But the history found in this record does not indicate that the door hit

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<sup>17</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

<sup>18</sup> *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

claimant's shoulder. Therefore, the causation opinion of Dr. Do is flawed and factually supports neither party to this dispute.

The Board finds the testimony of claimant, coupled with the opinion of Dr. Murati, to be the more credible in this case and the Award of the ALJ will be modified accordingly. Additionally, Dr. Murati found claimant to have suffered a 5 percent permanent partial whole body disability to the thoracic spine from the myofascial pain. And Dr. Murati found claimant to have suffered a 4 percent permanent partial disability to the left upper extremity for the range of motion limitations, which converts to a 2 percent whole body disability under the fourth edition of the *AMA Guides*.<sup>19</sup> Utilizing the combined values chart from the fourth edition of the *AMA Guides*,<sup>20</sup> claimant would have a 12 percent permanent partial whole body disability from the accident of August 3, 2005. The Award of the ALJ will be modified accordingly.

**5. Is claimant entitled to additional medical treatment expenses?**

The ALJ limited claimant to \$500.00 for the treatment provided by Dr. Dorey to claimant's left shoulder. The Board finds this treatment was reasonable and related to a condition caused by claimant's accident. It was provided by a doctor appointed by the ALJ to consider claimant's injuries and their relation to the accident and whether they should be the responsibility of respondent. Therefore, the Award, which finds respondent not liable for this treatment and which limits claimant to \$500.00 as unauthorized medical treatment, is modified to find respondent responsible for this treatment as authorized medical treatment, with payment to be for the entire cost of the treatment, subject to the limitations of the medical fee schedule.

**6. Is claimant entitled to benefits for future medical treatment and unauthorized medical expenses?**

The ALJ awarded claimant future medical treatment upon application and an unauthorized medical allowance of up to \$500.00 less any amounts not already incurred. The Board find this appropriate and affirms same.

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<sup>19</sup> *AMA Guides* (4th ed.).

<sup>20</sup> *AMA Guides* (4th ed.).

**CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed with regard to the findings of the ALJ regarding the average weekly wage calculations, the TTD calculations and the amount of weekly TTD benefits awarded in this matter, but modified with regard to the amount of permanent disability and claimant's entitlement to authorized, unauthorized and future medical treatment. Claimant's award is modified to grant claimant a 12 percent permanent partial whole body disability for the injuries suffered to his cervical and thoracic spine and his left shoulder from the accident on August 3, 2005.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated November 5, 2007, should be, and is hereby, modified to award claimant a 12 percent permanent partial whole body disability for the injuries suffered from the accident on August 3, 2005.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, James Bruce Eichelberger, and against the respondent, Price Truck Line, Inc., and its insurance carrier, National Interstate Insurance Company, for an accidental injury which occurred on August 3, 2005, and based upon an average weekly wage of \$663.48 through February 9, 2006, and an average weekly wage of \$724.17 effective February 10, 2006. Claimant is entitled to 15.71 weeks of temporary total disability compensation at the rate of \$442.34 per week or \$6,949.16, followed by 11.43 weeks at the reduced rate of \$442.34 per week or \$5,055.95, followed by 38.37 weeks at the increased disability rate of \$467.00 in the amount of \$17,918.79 for a 12 percent permanent partial whole body disability, making a total award of \$29,923.90.

As of the date of this award, the entire award is due and owing and ordered paid in one lump sum, minus amounts previously paid.

In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained in this award.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March, 2008.

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BOARD MEMBER

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BOARD MEMBER

**CONCURRING AND DISSENTING OPINION**

The undersigned Board Member respectfully dissents from the opinion of the majority. The majority allowed the filing of the Appeal in this matter, even though the 10-day limit contained in K.S.A. 2007 Supp. 44-551(i)(1) was long past. The justification for this late filing came in the form of an Affidavit filed by claimant's attorney attesting to the fact he had not learned of the Award until being notified of its existence on November 30, 2007. The Board, relying on *Nguyen* and *Johnson*, determined that there was justification for the delay as due process had not been accorded claimant with this apparent mistake in mailing. The undersigned finds neither *Nguyen* nor *Johnson* to be supportive of this finding. In *Nguyen*, it was proven that the claimant's attorney did not receive the award as the award contained the wrong zip code, causing the award to go to the wrong address and causing the claimant to receive the award after the appeal time had run. In this case, claimant acknowledges the Award contained the correct mailing address and zip code of claimant's attorney. Thus, *Nguyen* is distinguishable from this matter. In *Johnson*, the claimant's attorney provided affidavits from office staff attesting to the fact the award did not arrive timely. Here, the only affidavit of record attests only to the fact claimant's attorney only first learned of the Award on November 30, 2007. There is no affidavit from any support staff indicating the Award did not arrive in his office before that date. The evidence provided to the Board at oral argument shows the envelope from the Workers Compensation Division with a metered date on November 5, 2007, the same date as the Award. A copy of the Award, also stipulated into evidence to the Board, shows a received date stamp of December 4, 2007. No evidence in this record explains how this stamp came to be on the Award, who placed that date stamp on the Award, and whether the Award had arrived in the office of claimant's attorney at any date before the faxed copy arrived on November 30, 2007. This record lacks sufficient proof by claimant that the Award did not arrive in a timely manner and was simply misplaced. Absent additional

evidence, this Board Member would find the appeal in this matter was not timely, and the appeal should be dismissed. However, if the Board has the jurisdiction to review this appeal, then the undersigned otherwise agrees with the findings and conclusions of the majority.

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BOARD MEMBER

**CONCURRING AND DISSENTING OPINION**

The undersigned agree with the majority's factual findings and its determinations, including its determination that claimant suffered permanent injuries to his left shoulder in addition to his head and neck, and agree to the percentages of functional impairment awarded for those injuries. However, we disagree with the majority's conclusion that claimant's percentage of functional impairment for his scheduled injury to his upper extremity should be combined with his percentage of functional impairment for his general body injury to his head, neck and back for a single permanent partial disability award based upon the total of all his impairments. We read *Casco* to require the shoulder injury to be compensated as a separate scheduled injury.

Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.

. . . .

K.S.A. 44-510e permanent partial disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.<sup>21</sup>

Because the shoulder is contained within the schedule of K.S.A. 44-510d(a), claimant's disability to this extremity must be compensated according to the schedule at the 225-week level. The back, however, is not contained within the schedule and, therefore, must be compensated as a general body disability under K.S.A. 44-510e.

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<sup>21</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶¶ 7, 10, 154 P.3d 494, rev. denied \_\_\_\_ Kan. \_\_\_\_ (2007).

All of claimant's injuries occurred as a direct consequence of a single work-related accident. Nevertheless, claimant's left upper extremity injury is contained within the schedule of injuries in K.S.A. 44-510d. Therefore, claimant's permanent disability resulting from his upper extremity injury is compensable as a separate scheduled injury based upon his percentage of functional impairment for that injury alone. As for the back, claimant is entitled to a separate award of permanent partial disability compensation for the greater of either the percentage of functional impairment or his percentage of work disability.

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BOARD MEMBER

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BOARD MEMBER

c:     Randall J. Price, Attorney for Claimant  
        Jennifer L. Arnett, Attorney for Respondent and its Insurance Carrier  
        Bryce D. Benedict, Administrative Law Judge